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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re

ACACIA MEDIA TECHNOLOGIES CORPORATION

Case No. 05-CV-1114 JW

ROUNDS 1 & 2 DEFENDANTS' OPPOSITION TO ACACIA'S MOTION FOR RECONSIDERATION

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Judge: Hon. James Ware

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INTRODUCTION

Acacia argues that the Court erred in construing the term "storing" in the initial step of Claim 41 of the '992 patent to mean "placing."[1] Acacia is wrong. The Court's construction is fully supported by the ordinary meaning of "storing," the claim language, and the specification. Indeed, Acacia's motion fails to meet the standards for reconsideration, ignoring entirely the fact that it was *Acacia* that originally proposed the "placing" construction adopted by the Court. In what has become a pattern of shifting positions and inconsistent arguments in this litigation, Acacia's current proposal is its *fourth* proposed construction of Claim 41's initial "storing" step. And despite originally arguing that "placing" was the only construction of "storing" that was consistent with both the specification and the ordinary meaning of the term, Acacia now argues that "placing" is actually *inconsistent* with the specification and that the ordinary meaning of "storing" is "retaining."

Enough is enough. For the following reasons, Acacia's duplicitous efforts should be rejected. The Court should hold Acacia to its original proposed construction and affirm its construction of "storing" to mean "placing." The Court should further deny the remainder of Acacia's motion since it fails to meet the requirements for reconsideration under the Local Rules.

BACKGROUND

The Court's current construction of "storing" dates back to the original *Markman* proceedings in this case. On January 8, 2004, Acacia filed its first claim construction brief.

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[1] Acacia's entire motion should be denied for failing to meet the standards for reconsideration. The Defendants write separately on the "storing" term to address Acacia's unjustified pattern of shifting positions on this term. The following Defendants join in this opposition: the DIRECTV Group, Inc.; Cox Communications, Inc.; Hospitality Network, Inc; Ademia Multimedia, LLC; AEBN, Inc.; Audio Communications, Inc.; Cyber Trend, Inc.; Cybernet Ventures, Inc.; ACMP, LLC; Game Link, Inc.; Global AVS, Inc.; Innovative Ideas International; Lightspeed Media Group, Inc.; National A-1 Advertising, Inc.; New Destiny Internet Group, LLC; VS Media, Inc.; Cable One, Inc.; Mediacom Communications Corporation; Bresnan Communications; Cequel III Communications I, LLC (dba Cebridge Connections); Charter Comms., Inc.; Armstrong Group; Block Comms., Inc.; East Cleveland Cable TV & Comms. LLC; Wide Open West Ohio LLC; Massillon Cable TV, Inc.; Mid-Continent Media, Inc.; US Cable Holdings LP; Savage Comms., Inc.; Sjoberg's Cablevision, Inc.; Loretel Cablevision; Arvig Comms. Systems; Cannon Valley Comms., Inc.; NPG Cable, Inc.; Comcast Cable Communications, LLC; and Insight Communications, Inc.

(Declaration of David M. Hymas in Support of Rounds 1 & 2 Defendants' Opposition to Acacia's Motion For Reconsideration ("Hymas Decl."), Ex. A.)[2] At that time Acacia argued that in the context of Claim 41, the term "storing" was "being used to describe a definite action — the act of 'storing.'" (*Id.* at 22.) Citing Webster's dictionary, Acacia proposed that "storing" in this context meant "*the act of placing* items having information in a source material library . . . ." (*Id.* at 23 (emphasis added).) Acacia also emphasized that Claim 41's use of "storing" was *different* than the manner in which Claim 1 of the '992 patent used the same term.[3] Acacia argued that in contrast to Claim 41, the context of Claim 1 dictated that the term "storing" meant "providing storage room for." (*Id.* at 19.)

In its July 12, 2004, *Markman* Order ("*Markman* I," attached as Ex. B), the Court noted Acacia's argument that the "storing" step described an "act," which was analogous to the specification's description of taking books off a shelf at a local library. (*Id.* at 25.) Consistent with Acacia's request, and with the Court's current construction, the Court construed Claim 41's first "storing" step to mean "adding items having information to a collection of existing materials." (*Id.*)

After the Court's *Markman* I order, the lawsuit against the Round 1 Internet Defendants was consolidated as a multi-district litigation with cases against defendants in the cable and satellite industries (the "Round 2 Defendants"). As part of the multi-district case, the Court invited all parties, including Acacia, to move to reconsider *any* of the Court's *Markman* I rulings. Acacia moved to reconsider the Court's rulings on numerous terms. (Ex. C.) Acacia did not, however, move the Court to reconsider its construction of "storing." (*Id.*) After considering the voluminous evidence, the Court issued a December 7, 2005, Further Claim Construction Order ("*Markman* II," attached as Ex. D).

Additional cable defendants (the "Round 3 Defendants") were then added to the multi-district case. (Ex. E.) Because the Round 3 Defendants had not briefed the terms construed in the

[2] All referenced exhibits are attached to the Hymas Decl.

[3] Claim 1 includes a limitation for a "library means for *storing items containing information*."

Court's *Markman* I and II orders, in February 2006 the Court set an additional hearing date for any terms in the '992 or '275 patents on which the Round 3 Defendants wished to move for reconsideration.

On May 26, 2006, Acacia served on the Defendants its proposed constructions of terms in the '992 and '275 patents for which the Round 3 Defendants planned to move for reconsideration. (Ex. F.) Acacia proposed that in Claim 41 "[t]he phrase 'storing items having information in a source material library' has *already been construed* to mean 'adding items having information to a collection of existing materials.'" (*Id*. at 15 (emphasis added).)

Despite its May 26 proposed construction, in its claim construction brief on the Round 3 reconsideration terms Acacia included a newly amended proposal for "storing":

> Acacia contends that this phrase should be construed as "adding items having information to a collection of existing materials *and maintaining the items having information in the collection*."

(Ex. G at 68 (emphasis added).) Even though Acacia never moved for reconsideration on this term during the 2005 *Markman* II round of briefing, for the first time Acacia suggested that Claim 41's "storing" step must include a "maintaining" limitation. And in sharp contrast to its earlier arguments, Acacia argued that its new proposal was consistent with both the specification and the ordinary meaning of the term "storing." (*Id*. at 68-69.)

In August 2006, the Round 3 Defendants filed their brief regarding previously construed terms in the '992 and '275 patents. In its reply brief Acacia once again amended its proposed construction without providing notice to any of the Defendants or allowing them a chance to respond. Acacia now argued that the "storing" term did not require adding items at all:

> In its opening brief, Acacia suggested modifying the construction for 'storing' to be 'adding and maintaining.' However, for the Court to construe the term 'storing' in claim 41 to be consistent with the specification and consistent with the Court's construction of storing in claim 1, the construction should be 'adding items having information to ***or*** maintaining items having information in a collection of existing materials.'"

(Ex. H at 56 (emphasis added).) By including the disjunctive "or" in place of its previously proposed "and," Acacia's construction proposed for the *first* time that "adding" or "placing" items was no longer required by Claim 41's initial "storing" step. This proposed construction thus contradicted the Court's *Markman* I construction entirely.

On December 14, 2006, this Court issued its *Markman* order addressing terms in the '992 and '275 patents ("*Markman* III," attached as Ex. I). With regard to the term "storing" in Claim 41's initial step, the Court ruled that because the limitation was part of a method claim, it must describe "a manipulative step or act." (*Id*. at 30.) Consistent with this requirement and the ordinary meaning of the term "storing," the Court construed the limitation to mean "placing." (*Id*.) The Court's construction was not only indistinguishable from its *Markman* I construction that "storing" meant "adding," it was the *very same construction* that Acacia proposed almost three years prior.

Undeterred by its prior inconsistent positions and its three prior bites at the apple, Acacia has now filed yet another motion for reconsideration. Abandoning entirely its August 2006 proposal that "storing" meant "adding" or "maintaining," Acacia's fourth and current argument is that "storing" must mean "retaining." (Acacia Mot. at 20.)[4] Acacia's motion should be denied.

ARGUMENT

I. ACACIA HAS NOT SATISIFED ITS BURDEN OF DEMONSTRATING THAT THE COURT'S ORDER SHOULD BE RECONSIDERED.

Local Rule 7-9 outlines three alternative requirements for a motion for reconsideration: (1) a material difference in law or facts existed before entry of the challenged order; (2) a material difference in law or fact emerged after entry of the order; or (3) there was a manifest failure by the Court to consider material facts or dispositive legal arguments. Civil L.R. 7-9(b)(1)-(3). Acacia's motion for reconsideration meets none of these criteria.

[4] "Acacia Mot." refers to "Plaintiff Acacia Media Technologies Corporation's Memorandum of Points and Authorities in Support of its Motion for Reconsideration of Certain Claim Construction Terms Construed by the Court in its Third Claim Construction Order and its Forth Claim Construction Order," which was filed on May 18, 2007 (Docket No. 237).

As outlined above, Acacia's motion amounts to nothing more than reconsideration of a position that *Acacia* itself has taken in this case. Acacia has by now proposed *four* different constructions of the term "storing":

First Proposal	"[T]he *act of placing* items having information in a source material library . . . ."	January 8, 2004 Opening Claim Construction Brief at 23 (Ex. A (emphasis added).)
May 26 Proposal	"The phrase 'storing items having information in a source material library' *has already been construed* to mean 'adding items having information to a collection of existing materials.'"	May 26, 2006 Proposed Constructions at 15 (Ex. F (emphasis added).)
Second Proposal	"[A]dding items having information to a collection of existing materials *and maintaining the items having information in the collection*."	July 21, 2006, Claim Construction Brief at 68 (Ex. G (emphasis added).)
Third Proposal	"[A]dding items having information to ***or*** maintaining items having information in a collection of existing materials."	August 25, 2006, Claim Construction Reply Brief at 56 (Ex. H (emphasis added).)
Fourth Proposal	"the term *'storing' in this phrase should mean 'retaining*.'"	May 18, 2007, Acacia Mot. at 20 (emphasis added).)

As this table makes clear, the Court's current construction was originally proposed by *Acacia*. According to Acacia in 2004, "placing" was the only construction consistent with the specification and the ordinary meaning of the term as it was used in Claim 41. Incredibly, Acacia now argues that "placing" is actually *inconsistent* with the specification and that the ordinary meaning of "storing" means "retaining." (Acacia Mot. at 22-23.) Acacia's motion for reconsideration even cites the same section of the specification in support of its current "retaining" proposal that Acacia pointed to in support of its original "placing" construction. (Acacia Mot. at 22-23 (citing '992 patent, 18:53-55); Ex. J at 20 (citing '992 patent, 18:53-59).)

Similarly, Acacia makes a remarkable about-face with its argument that the Court erred in stating that method claims must describe a manipulative step or act. In January 2004, Acacia emphasized that the "placing" construction that the Court ultimately adopted was required because it described an affirmative "act." Acacia criticized the Internet Defendants for not proposing a construction that described an "act" and included a footnote that cited § 101 of the Patent Act, as well as two nineteenth century Supreme Court cases, complete with parenthetical quotations, supporting Acacia's position.[5] (Ex. J at 20 n.8.) Acacia concluded that "storing" should mean "the act of placing" because it was "consistent with the specification . . . consistent with the ordinary and customary meaning of the terms of the claim phrase, and . . . state[d] an act[.]" (*Id*. at 21.)

Acacia also now contends that "storing" should have the same construction in both Claims 1 and 41 and criticizes the Court for its different constructions. But again, it was *Acacia* that originally argued that the two claims used the term "storing" in different ways and should therefore be construed differently. Similar to its current proposal of "retaining," Acacia originally proposed that "storing," as used in Claim 1, meant "providing storage room for." (Ex. A at 19.) However, Acacia went on to distinguish Claim 41 from Claim 1. It argued that unlike Claim 1, Claim 41 was a method claim and had to therefore describe an act. (*Id*. at 22; Ex. J at 20.)

The Local Rules do not provide for reconsideration based on a party's change of litigation strategy. Acacia does not point to any change in either law or fact that would justify a motion for reconsideration. Neither does Acacia point out a manifest failure by the Court to consider material facts or dispositive legal arguments. Indeed, the opposite is true. The Court considered Acacia's arguments and ultimately adopted Acacia's original proposed construction. Acacia cannot now change its position and use that change to justify a motion for reconsideration.

II. THE COURT'S CONSTRUCTION OF "STORING" IS CORRECT.

The Court's construction of "storing" to mean "placing" is supported by the ordinary meaning of the term, the specification, the claim language, and well-established claim construction principles. As Acacia has repeatedly admitted during the course of this litigation, the ordinary meaning of the term "storing" is "placing." Not only did Acacia make this same argument in its 2004 *Markman* briefing, the IEEE definition it includes with its current motion for reconsideration also makes it clear that of the ordinary meanings of "storing," the first is "[t]o place data into a device." (Acacia Mot. at 21.) This is the same active meaning of placing that was adopted by the Court.

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[5] Acacia cited the following cases and included the following parentheticals: *Tilghman v. Proctor*, 102 U.S. 707, 727 (1880) ("A process is an act, or a mode of acting"), and *Cochrane v. Deener*, 94 U.S. 780, 788 (1876) ("A process is . . . an act, or a series of acts"). (Ex. J at 20 n.8.)

The Court's construction is also fully consistent with the specification and claims. The Yurt patents use the verb "storing" or "store" frequently and make it plain that the term means an *affirmative act* of placing or adding. For example, the specification states that the transmission system performs the affirmative steps of "converting, compressing and *storing* [the items'] audio and video data in the compressed data library means." ('992 patent, 6:5-8 (emphasis added).) There can be no question that the specification here is using the term "storing" to require the affirmative act of "placing," consistent with the Court's construction. Data is taken from the source material library, formatted, compressed, and then *placed* in the compressed data library. (*Id*. at 6:15-19; 10:31-42.)

Several of the '992 patent's claims similarly require that the term "storing" be given the construction adopted by the Court. Indeed, Claim 41 itself uses the term "storing" in two separate steps. The second-to-last step of the claimed method provides: "storing, as a file, the compressed, formatted, and sequenced data blocks with the assigned unique identification code." Consistent with the specification and the initial "storing" step, this "second" storing step must refer to the affirmative act of placing. Acacia offers no reason for the Court to conclude that the term "storing" should be given a different meaning in the two "storing" steps of Claim 41. *See, e.g., Digital Biometrics, Inc. v. Identix, Inc.*, 149 F.3d 1335, 1345 (Fed. Cir. 1998) ("[T]he same word appearing in the same claim should be interpreted consistently.").

The Court's construction is also supported by the rules of claim construction. In support of its *Markman* III construction of "storing," the Court noted the principle that the steps of a method patent must recite "a manipulative step or act." (Ex. I at 30.) Because "placing" was a synonym for storing and because it described an active or manipulative step, the Court construed "storing" to mean "placing." In support of its latest "retaining" proposed construction, Acacia now denies that the elements of a method claim must recite active or manipulative steps. (Acacia Mot. at 21.) Acacia is wrong.

As Acacia pointed out in its January 2004 brief, the Supreme Court has repeatedly explained that a process claim consists of a single or a *series of transformative acts*. *Diamond v. Diehr,* 450 U.S. 175, 183 (1981) ("A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.") (quoting *Cochrane v. Deener*, 94 U.S. 780, 787-88 (1877)); *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972) ("Transformation and reduction of an article 'to a different state or thing' is the clue to the patentability of a process claim that does not include particular machines."); *Tilghman*, 102 U.S. at 728 ("A process is an act, or a mode of acting . . . a conception of the mind, seen only by its effects when being executed or performed."). Federal Circuit case law is equally clear that method claims consist of nothing more than the acts they recite. *See, e.g.*, *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005) ("A method or process consists of one or more operative steps . . . a process is nothing more than the sequence of actions of which it is comprised[.]"); *see also Minton v. Nat'l Ass'n of Sec. Dealers, Inc.*, 336 F.3d 1373, 1378 (Fed. Cir. 2003) ("[A] process is a series of acts."); *In re Kollar*, 286 F.3d 1326, 1332 (Fed. Cir. 2002) ("[A] process . . . consists of a series of acts or steps. . . . It consists of doing something, and therefore has to be carried out or performed.").

That the Court used the term "manipulative" to highlight this basic proposition of law is unsurprising. As Acacia's citation to the *Daiichi Pharmaceutical* case underscores, courts have used the term "manipulative" to describe a process patent's claim elements. *Daiichi Pharm. Co. v. Apotex, Inc.*, 441 F. Supp. 2d 672, 677 n.9 (D.N.J. 2006) (citing Landis treatise regarding requirement that method claims must include "acts or manipulative steps"); *EBS Dealing Res., Inc. v. Intercontinental Exch., Inc.*, 379 F. Supp. 2d 521, 524 n.2 (S.D.N.Y. 2005) (quotation omitted) ("A method claim is a series of steps of manipulation, whether the steps would be performed wholly by machine or partly by a person, so long as they are not purely mental steps[.]"). Indeed, the Court's statement of the law mirrors language found in what is likely the most commonly referenced treatise on patent claim drafting. Robert C. Faber, *Landis on Mechanics of Patent Claim Drafting* § 4:1 (5th ed. 2006) ("A very important rule to remember is that the 'elements' of a method claim, instead of being structural parts, are, and must be, *acts* or manipulative steps that are performed upon an article, workpiece, or chemical substance.") (emphasis in original) (attached as Ex. K).[6]

Rather than address these cases or their requirement that method claims include active steps, Acacia proposes a non-active construction — "retaining" — for the "storing" step. Acacia would read the claim to specify, as the first step of the claimed method, that the transmission system do nothing. Nothing transformative or active would occur, according to Acacia, until the subsequent retrieving step. Aside from violating the claim construction rules described above, this proposed construction makes little sense in light of the claim language, which describes a process for adding diverse physical items such as books, video tapes, and computer disks to a source material library for eventual conversion and distribution to end users. In contrast, the Court's "placing" construction accurately describes the active nature of the storing step.

In short, the Court's construction is supported by the plain meaning of the term "storing," as well as ample authority, and should not be disturbed.

III. ACACIA'S LATEST PROPOSED CONSTRUCTION REWRITES THE CLAIM LANGUAGE AND IS NOT SUPPORTED BY ACACIA'S OWN EXPERT OR THE SPECIFICATION.

Acacia now argues that "retaining" is a "perfect synonym" of its previous proposed construction of "maintaining" and that "retaining" describes the "storing" function of Claim 41. (Acacia Mot. at 20 n.24.) Acacia's proposal is a transparent attempt to rewrite the claim language; an attempt that is contradicted by Acacia's own expert and that finds no support in the specification.

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[6] Acacia uses an example of a method claim to make bread in an attempt to illustrate its argument that the elements of such claims do not need to recite manipulative steps. (Acacia Mot. at 21-22.) This example is particularly unconvincing since it is the same analogy used in the *Landis* treatise to illustrate the opposite position — that a method claim's elements "must be, acts or manipulative steps." Faber, *supra*, § 4:1.

In his declaration supporting Acacia's motion, Acacia's expert, Mr. Weiss, states that one of skill in the art would have understood the term "storing" to have "two aspects," "placing or putting objects or information into a storage container" and "retaining, holding, or maintaining" such objects or information "in a storage container." (Weiss Decl. at 5.) In other words, Mr. Weiss's own testimony supports the Court's construction that "storing" means "placing." It is also consistent with the IEEE definition Acacia cites in its own brief, which makes clear that one of the ordinary meanings of "storing" is "[t]o place data into a device." (Acacia Mot. at 21.) And yet, Acacia's proposed construction says nothing of the "placing or putting" function Mr. Weiss states is implied in the term "storing." Instead, Acacia ignores its own expert's definition of the term and substitutes the term "retaining" for the actual claim language. Acacia's rewritten claim language should be rejected. *See Chef Am., Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371, 1374 (Fed. Cir. 2004) ("[I]n accord with our settled practice we construe the claim as written, not as the patentees wish they had written it.").

Nor does the specification support Acacia's construction. Mr. Weiss states that "maintaining" and "retaining" connote such storage functions as controlling the "temperature and humidity" where digital media is kept, "robotic machinery to load and unload the media," "keeping power on the memory devices and continually refreshing them through a combination of pulses," and "the periodic movement of copies of the content from one medium to another" as the older medium reaches the end of its useful life. (Weiss Decl. at 6.) And yet, the '992 patent's specification makes no reference whatsoever to *any* of these functions.

IV. THE COURT'S CONSTRUCTION OF "STORING" IN CLAIM 41 DOES NOT CONTRADICT ITS CONSTRUCTION OF THE "INPUTTING" STEP OF CLAIM 14 IN THE '863 PATENT.

Acacia faults the Court's construction of "storing" because it is allegedly not sufficiently dissimilar from the Court's construction of the term "inputting" as that term is used in Claim 14 of the '863 patent. (Acacia Mot. at 22-23.) In its March 2, 2007, *Markman* order ("*Markman* IV," attached as Ex. L), the Court construed the "inputting" step of Claim 14 to mean "putting . . . into." (*Id*. at 12.) Acacia argues that the Court's constructions of Claim 41's storing step and Claim 14's inputting step are the same and thus violate the claim construction principle that different terms have different meanings. (Acacia Mot. at 23.) Acacia's argument is meritless. The Court's constructions are consistent with claim construction canons.

The Court construed "inputting" to mean "putting . . . into" and "storing" to mean "placing." These constructions make sense since related terms, such as "inputting" and "storing," will have related meanings and, therefore, related constructions. Moreover, different terms can have identical meanings where the patentee used them to describe similar concepts. *See, e.g.*, *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1120 (Fed. Cir. 2004) (declining to differentiate meanings of "connected" and "associated" because "patentee used different words to express similar concepts"); *Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365, 1373 (Fed. Cir. 2002) (construing "computer" and "computer system" synonymously where the patent provided "no indication that the two terms mean different things"). Acacia cannot create conflict in the Court's constructions where there is none.

V. THE COURT SHOULD DENY THE REMAINDER OF ACACIA'S MOTION FOR RECONSIDERATION.

Acacia also moves for reconsideration on the Court's constructions of the terms "transmission system," "reception system," and "sequence of addressable data blocks," as well as the Court's constructions of Claims 45 and 46 of the '992 patent. As with its arguments on the term "storing," Acacia's motion recycles arguments that it has already raised and that have been correctly rejected by this Court. Accordingly, Acacia's motion fails to meet the requirements for reconsideration and should be denied.

CONCLUSION

For the reasons set forth above, the Court should deny Acacia's motion for reconsideration regarding the term "storing" in Claim 41 of the '992 patent and affirm its *Markman* III construction that "storing" means "placing." The remainder of Acacia's motion should also be denied for failing to meet the standards for reconsideration.

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